

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWARD R. CRUZ,)	
)	No. CV-06-3047-MWL
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
LINDA S. McMAHON, ¹)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on January 16, 2007. (Ct. Rec. 12, 17). Plaintiff Edward R. Cruz ("Plaintiff") filed a reply brief on January 17, 2007. (Ct. Rec. 19). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12), **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 17), and **REMANDS** the case for further proceedings.

¹As of January 20, 2007, Linda S. McMahon succeeded Defendant Commissioner Jo Anne B. Barnhart as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Commissioner Linda S. McMahon should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

JURISDICTION

On September 16, 2002, Plaintiff filed concurrent applications for Supplemental Security Income ("SSI") benefits and Disability Insurance Benefits ("DIB"), alleging disability since January 1, 1998, due to a lower back injury. (Administrative Record ("AR") 52-54, 63, 161-164). Plaintiff's applications for SSI and DIB were denied initially and on reconsideration.

On February 18, 2005, Plaintiff appeared, unrepresented, before Administrative Law Judge ("ALJ") James Burke, at which time testimony was taken solely from Plaintiff. (AR 173-189). On June 28, 2005, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 17-26). The Appeals Council denied a request for review on May 23, 2006. (AR 4-7). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on June 9, 2006. (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 42 years old on the date of the ALJ's decision, earned a GED and completed a year of college, and has past work experience as a landscape company owner/operator. (AR 18, 69). Plaintiff indicated that he stopped working on January 1, 1998, the alleged onset date of disability, because the pain became too unbearable and made it difficult for him to concentrate. (AR 63).

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1 Plaintiff appeared without counsel at the administrative
2 hearing held on February 18, 2005. (AR 175). Although the ALJ
3 strongly encouraged Plaintiff to get an attorney before proceeding
4 with his Social Security appeal hearing, Plaintiff elected to
5 proceed unrepresented. (AR 175).

6 Plaintiff testified that he hurt his back approximately one
7 year prior to his first doctor appointment related to the back
8 injury. (AR 179). He stated that he was lifting weights and his
9 back went out causing him to fall to the floor. (AR 179-180). He
10 testified that he was unable to immediately get up and, since that
11 day, his back has not been the same. (AR 180). He has taken
12 aspirin for the inflammation and began seeing a doctor eight or
13 nine months after his back flared up a second time. (AR 180-181).
14 Plaintiff testified that he could not go back to work because when
15 he exerts himself, his back locks up. (AR 182). He stated that
16 he cannot do too much work, cannot sit in one spot too long and
17 cannot stand for too long. (AR 182). Plaintiff did, however,
18 testify that his back had gotten a little better since his
19 original weight-lifting injury. (AR 183, 186).

20 Plaintiff stated that, as a result of the back pain, he also
21 gets easily agitated. (AR 187, 188). He stated that he does not
22 get along well with others, but if on his own or as his own boss,
23 he was "just fine." (AR 188). Plaintiff indicated his daily
24 activities consist of doing some cooking, dusting, and maybe a
25 little laundry, but "not much." (AR 187-188).

26 SEQUENTIAL EVALUATION PROCESS

27 The Social Security Act (the "Act") defines "disability" as
28 the "inability to engage in any substantial gainful activity by

1 reason of any medically determinable physical or mental impairment
2 which can be expected to result in death or which has lasted or
3 can be expected to last for a continuous period of not less than
4 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
5 Act also provides that a Plaintiff shall be determined to be under
6 a disability only if his impairments are of such severity that
7 Plaintiff is not only unable to do his previous work but cannot,
8 considering Plaintiff's age, education and work experiences,
9 engage in any other substantial gainful work which exists in the
10 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
11 Thus, the definition of disability consists of both medical and
12 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
13 (9th Cir. 2001).

14 The Commissioner has established a five-step sequential
15 evaluation process for determining whether a person is disabled.
16 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
17 engaged in substantial gainful activities. If he is, benefits are
18 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
19 decision maker proceeds to step two, which determines whether
20 Plaintiff has a medically severe impairment or combination of
21 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

22 If Plaintiff does not have a severe impairment or combination
23 of impairments, the disability claim is denied. If the impairment
24 is severe, the evaluation proceeds to the third step, which
25 compares Plaintiff's impairment with a number of listed
26 impairments acknowledged by the Commissioner to be so severe as to
27 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
28 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment

1 meets or equals one of the listed impairments, Plaintiff is
2 conclusively presumed to be disabled. If the impairment is not
3 one conclusively presumed to be disabling, the evaluation proceeds
4 to the fourth step, which determines whether the impairment
5 prevents Plaintiff from performing work he has performed in the
6 past. If Plaintiff is able to perform his previous work, he is
7 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
8 cannot perform this work, the fifth and final step in the process
9 determines whether Plaintiff is able to perform other work in the
10 national economy in view of his residual functional capacity and
11 his age, education and past work experience. 20 C.F.R. §§
12 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

13 The initial burden of proof rests upon Plaintiff to establish
14 a *prima facie* case of entitlement to disability benefits.
15 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
16 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
17 met once Plaintiff establishes that a physical or mental
18 impairment prevents him from engaging in his previous occupation.
19 The burden then shifts to the Commissioner to show (1) that
20 Plaintiff can perform other substantial gainful activity and (2)
21 that a "significant number of jobs exist in the national economy"
22 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
23 (9th Cir. 1984).

24 STANDARD OF REVIEW

25 Congress has provided a limited scope of judicial review of a
26 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
27 the Commissioner's decision, made through an ALJ, when the
28 determination is not based on legal error and is supported by

1 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
2 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
3 1999). "The [Commissioner's] determination that a plaintiff is
4 not disabled will be upheld if the findings of fact are supported
5 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
6 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
7 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
8 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
9 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
10 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
11 573, 576 (9th Cir. 1988). Substantial evidence "means such
12 evidence as a reasonable mind might accept as adequate to support
13 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
14 (citations omitted). "[S]uch inferences and conclusions as the
15 [Commissioner] may reasonably draw from the evidence" will also be
16 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
17 On review, the court considers the record as a whole, not just the
18 evidence supporting the decision of the Commissioner. *Weetman v.*
19 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
20 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

21 It is the role of the trier of fact, not this court, to
22 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
23 evidence supports more than one rational interpretation, the court
24 may not substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
26 (9th Cir. 1984). Nevertheless, a decision supported by
27 substantial evidence will still be set aside if the proper legal
28 standards were not applied in weighing the evidence and making the

1 decision. *Browner v. Secretary of Health and Human Services*, 839
2 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
3 evidence to support the administrative findings, or if there is
4 conflicting evidence that will support a finding of either
5 disability or nondisability, the finding of the Commissioner is
6 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
7 1987).

8 **ALJ'S FINDINGS**

9 The ALJ found at step one that Plaintiff has not engaged in
10 substantial gainful activity since his date of alleged onset of
11 disability. (AR 25). At step two, the ALJ determined that
12 Plaintiff has low back pain, a severe impairment, but that he does
13 not have an impairment or combination of impairments listed in or
14 medically equal to one of the Listings impairments. (AR 21). The
15 ALJ specifically concluded that Plaintiff's depressive disorder,
16 not otherwise specified ("NOS"), anxiety disorder, NOS, and
17 antisocial and narcissistic personality traits (or possible
18 personality disorder) result in no restriction of activities of
19 daily living, mild difficulties in maintaining social functioning,
20 no difficulties in maintaining concentration persistence or pace
21 and no episodes of decompensation. (AR 22).

22 The ALJ found that Plaintiff has the residual functional
23 capacity ("RFC") to perform substantially all of the requirements
24 of medium exertion level work. (AR 22-23). He found that
25 Plaintiff is able to occasionally lift or carry 50 pounds,
26 frequently lift or carry 25 pounds, stand about six hours in an
27 eight-hour workday, walk about two hours in an eight-hour workday,
28 sit (with normal breaks) for a total of about eight hours in an

1 eight-hour workday, and push and pull without limitations, other
2 than as present for lifting or carrying. (AR 22).

3 At step four of the sequential evaluation process, the ALJ
4 found that, based on Plaintiff's RFC, he could not perform his
5 past relevant work as a landscaper. (AR 24). However, the ALJ
6 determined that, based on Plaintiff's RFC, age, education, and
7 work experience, a finding that Plaintiff is "not disabled" is
8 directed by the Medical-Vocational Guidelines ("Grids") rule
9 203.28. (AR 24-25). Accordingly, the ALJ determined at step five
10 of the sequential evaluation process that Plaintiff was not
11 disabled within the meaning of the Social Security Act. (AR 25-
12 26).

13 ISSUES

14 Plaintiff contends that the Commissioner erred as a matter of
15 law. Specifically, he argues that:

16 1. The ALJ erred by finding that Plaintiff does not have
17 severe mental impairments;

18 2. The ALJ failed to set forth the requisite reasons,
19 supported by substantial record evidence, for rejecting the
20 opinions of examining psychologist, Frank Seibel, Psy.D.; and

21 3. The ALJ erred at step five of the sequential evaluation
22 process by relying exclusively on the Grids to deny Plaintiff's
23 claim rather than taking vocational expert testimony.

24 This Court must uphold the Commissioner's determination that
25 Plaintiff is not disabled if the Commissioner applied the proper
26 legal standards and there is substantial evidence in the record as
27 a whole to support the decision.

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DISCUSSION

Severe Mental Impairment

Plaintiff contends that the ALJ erred by concluding that he did not have severe mental impairments. (Ct. Rec. 14, pp. 9-16). Plaintiff specifically asserts that the ALJ erred by failing to set forth the requisite reasons, supported by substantial record evidence, for rejecting the opinions of examining psychologist, Frank Seibel, Psy.D. (Ct. Rec. 14, pp. 13-16). The Commissioner responds that the ALJ properly considered and addressed the medical evidence of record and properly determined the severity of Plaintiff's impairments. (Ct. Rec. 18, pp. 8-15).

Plaintiff has the burden of proving that he has a severe impairment at step two of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical and other evidence that shows that he has a severe impairment. 20 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is severe if it significantly limits one's ability to perform basic work activities. An impairment is considered non-severe if it "does not significantly limit your physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1521, 416.921.

Step two is "a de minimis screening device [used] to dispose of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when this conclusion is "clearly established by medical evidence." S.S.R. 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.

1 2005). Applying the normal standard of review to the requirements
2 of step two, the Court must determine whether the ALJ had
3 substantial evidence to find that the medical evidence clearly
4 established that Plaintiff did not have a medically severe mental
5 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
6 ("Despite the deference usually accorded to the Secretary's
7 application of regulations, numerous appellate courts have imposed
8 a narrow construction upon the severity regulation applied
9 here."); *Webb*, 433 F.3d at 687.

10 In this case, the ALJ concluded that Plaintiff's depressive
11 disorder, NOS, anxiety disorder, NOS, and antisocial and
12 narcissistic personality traits (or possible personality disorder)
13 result in no restriction of activities of daily living, mild
14 difficulties in maintaining social functioning, no difficulties in
15 maintaining concentration persistence or pace and no episodes of
16 decompensation. (AR 22). Accordingly, the ALJ found that
17 Plaintiff had no severe mental impairments and no resultant non-
18 exertional limitations. In making this determination, the ALJ
19 noted that there was no evidence in the record to support more
20 than a mild limitation with respect to Plaintiff's mental health
21 and, apparently, gave little weight to the report of Dr. Seibel
22 because it was mainly based on Plaintiff's statements.² (AR 22).

23 On February 12, 1999, Plaintiff underwent an orthopedic
24 examination by Todd B. Orvald, M.D. (AR 115-117). In addition to
25 findings related to Plaintiff's physical condition, Dr. Orvald
26 opined that Plaintiff may be depressed, as evidenced by his weight
27 loss, his sense of feeling depressed, and his inability to sleep

28 ²The ALJ found that Plaintiff was not credible in this case. (AR 23).

1 well at night, and suggested that Plaintiff be seen by the county
2 mental health clinic to further evaluate his mental health. (AR
3 117).

4 Plaintiff's long-time treating medical professional, Steven
5 L. Mack, PA-C, noted at an October 30, 2002 examination that
6 Plaintiff had depression and had agreed to go to counseling and
7 get an intake evaluation at Central Washington Comprehensive
8 Mental Health.³ (AR 131). Mr. Mack started Plaintiff on the
9 anti-depressant medication Zoloft which Plaintiff discontinued on
10 his own accord at three weeks of use because it made him feel
11 "disconnected." (AR 131-132).

12 On December 9, 2004, Plaintiff underwent a psychological
13 evaluation by Frank L. Seibel, Psy.D., at the request of the ALJ.
14 (AR 152-159). Dr. Seibel diagnosed Plaintiff with a depressive
15 disorder, NOS, an anxiety disorder, NOS, antisocial and
16 narcissistic personality traits, and a history of a back injury
17 with chronic pain and gave Plaintiff a Global Assessment of
18 Functioning ("GAF") score of 52.⁴ (AR 157). Although Dr. Seibel
19 indicated that Plaintiff appeared able to follow both simple and
20 complex instructions, he further noted that Plaintiff has
21 "significant difficulties getting along appropriately with others,
22 particularly supervisors." (AR 159). Dr. Seibel also indicated
23

24 ³There is no indication in the record that Plaintiff underwent
25 counseling following the examination. In fact, Mr. Mack's December 2, 2002
26 evaluation revealed that Plaintiff stated he had not gone to counseling,
because he did not feel that he needed it. (AR 132).

27 ⁴A GAF of 51 to 60 indicates moderate symptoms (e.g. flat affect and
28 circumstantial speech, occasional panic attacks), OR moderate difficulty in
social, occupational, or school function (e.g. few friends, conflicts with
peers or co-workers). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32
(4th ed. 1994).

1 that Plaintiff's ability to tolerate additional stress was
2 somewhat compromised by his report of back pain and his ongoing
3 symptoms of depression and anxiety. (AR 159).

4 Although the ALJ asserts that "there is simply no evidence in
5 the record to support more than a mild limitation" with respect to
6 Plaintiff's mental impairments (AR 22), the undersigned finds that
7 the medical record paints an incomplete picture of Plaintiff's
8 overall mental health. Although Plaintiff ultimately bears the
9 burden of establishing his disability, see *Bowen*, 482 U.S. at 146,
10 the ALJ had an affirmative duty to supplement Plaintiff's medical
11 record, to the extent it was incomplete, before rejecting his
12 claim of a severe mental impairment. See 20 C.F.R. §
13 404.1512(e)(1); S.S.R. 96-5p (1996). "In Social Security cases
14 the ALJ has a special duty to fully and fairly develop the record
15 and to assure that the claimant's interests are considered."
16 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). This duty is
17 especially important in a case, such as this, where the Plaintiff
18 appeared unrepresented by counsel. The ALJ's duty to supplement
19 Plaintiff's record is triggered by ambiguous evidence, the ALJ's
20 own finding that the record is inadequate or the ALJ's reliance on
21 an expert's conclusion that the evidence is ambiguous. *Tonapetyan*
22 *v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). Here, the
23 undersigned finds that the medical evidence was sufficiently
24 ambiguous with regard to Plaintiff's mental impairments to trigger
25 the ALJ's duty to fully and fairly develop the record.⁵

26
27 ⁵Moreover, the ALJ appears to note that the medical record is
28 inadequate with respect to Plaintiff's mental impairments. (AR 22).
The ALJ noted the reports of Dr. Orvald and Mr. Mack and indicated that,
subsequent to those records, the only other documentation of Plaintiff's
mental health is the December 2004 report by Dr. Seibel. (AR 22).

1 administrative hearing on February 18, 2005, but did not testify,
2 should have been presented with Dr. Seibel's findings, in
3 particular Dr. Seibel's conclusions that Plaintiff has
4 "significant difficulties getting along appropriately with others,
5 particularly supervisors" and that Plaintiff's ability to tolerate
6 additional stress was somewhat compromised by his report of back
7 pain and his ongoing symptoms of depression and anxiety. (AR
8 159). However, since no vocational expert testimony was taken,
9 further development is necessary to remedy defects and for a
10 proper determination to be made in this case.

11 On remand, the ALJ shall elicit the testimony of a medical
12 expert, at a new administrative hearing, to specifically address
13 Plaintiff's mental health and to assist the ALJ in formulating a
14 new RFC determination. The ALJ shall reassess Plaintiff's RFC,
15 taking into consideration the medical expert's testimony, the
16 medical reports of Mr. Mack, Dr. Orvald and Dr. Seibel, and any
17 additional or supplemental medical evidence relevant to
18 Plaintiff's claim for disability benefits. Plaintiff's RFC
19 assessment should also be presented to a vocational expert in
20 order to determine if he is capable of performing work existing in
21 sufficient numbers in the national economy, despite his exertional
22 and non-exertional limitations.

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
25 **GRANTED.**

26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
27 **DENIED.**

28 ///

3. The above captioned matter is **REMANDED** for additional proceedings as outlined above and pursuant to sentence four of 42 U.S.C. § 405(g).

4. Judgment shall be entered for **PLAINTIFF**.

5. An application for attorney fees may be filed by separate motion.

6. The District Court Executive is directed to change the title of this case to reflect the new Commissioner.

7. The District Court Executive is further directed to enter this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** the file.

IT IS SO ORDERED.

DATED this 2nd day of February, 2007.

s/Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE